IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-190

GENERAL ATOMIC COMPANY,
Petitioner,

v.

UNITED NUCLEAR CORPORATION AND
INDIANA AND MICHIGAN ELECTRIC COMPANY,
Respondents,

On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT UNITED NUCLEAR CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinion of the New Mexico Supreme Court (Pet. App. 1a-42a) is reported. *United Nuclear Corporation v. General Atomic Co.*, __ N.M. __, 597 P.2d 290 (1979). The decision and partial final judgment of the District Court for the First Judicial District, Santa Fe County, New Mexico (Pet. App. 43a-51a) is not reported.

JURISDICTION

The judgment of the New Mexico Supreme Court, affirming the partial final judgment of the District Court (Pet. App. 52a-53a), was entered on May 7, 1979, and the petition was timely filed. This Court's jurisdiction is grounded upon 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether petitioner waived any right to arbitration under the Federal Arbitration Act by inconsistent litigation activities extending over a period of more than two years.

2. Whether petitioner had a right to an evidentiary hearing on the waiver issue under the Federal Arbitration Act or the Due Process Clause of the Fourteenth Amendment, when the issue was decided upon the basis of pleadings and other matters of record, no witnesses were tendered, and no objection was made in the trial court to the procedure followed by that court.

3. Whether the trial court had jurisdiction under §3 of the Federal Arbitration Act to decide that GAC was "in default in proceeding with such arbitration" by reason of its waiver of arbitration through inconsistent litigation activities.

4. Whether issues as to violation of the New Mexico antitrust laws, and other issues intertwined therewith, are arbitrable under the Federal Arbitration Act.

STATUTES INVOLVED

Section 3 of the Federal Arbitration Act, 9 U.S.C. §3, is set forth in the petition (Pet. 3-4).

STATEMENT

Contrary to the claim of General Atomic Company ("GAC"), this is not "another chapter in the struggle of General Atomic Company . . . to have a billion-dollar dispute with United Nuclear Corporation ("UNC") resolved in arbitration" (Pet. 5). Rather, it is another chapter in the struggle of GAC to avoid the consequences of its decision to litigate, instead of arbitrate, its principal disputes with UNC, and thus to escape liability for its participation in a vicious price-fixing uranium cartel and avoid the consequences of its massive failures to comply with discovery orders regarding its illegal participation in that cartel.[1]

The only issues properly before this Court on GAC's present petition are those relating to a judgment of the New Mexico Supreme Court affirming a December 27, 1977 order by the trial court denying GAC's motion under 9 U.S.C. §3 for a stay pending arbitration. The default and declaratory judgments subsequently entered by the trial court by reason of GAC's persistent bad faith non-compliance with discovery orders are now on appeal before the New Mexico Supreme Court, were not dealt with in the judgment which GAC now seeks to have this Court review, and thus are not properly involved in the petition here despite GAC's suggestions to the contrary.[2]

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[1] One of GAC's constituent partners, Gulf Oil Corporation ("Gulf") pleaded *nolo contendere* in May, 1978 to a criminal information brought by the United States relating to Gulf's participation in the uranium cartel. *United States v. Gulf Oil Corporation*, Criminal No. 78-123 (W.D.Pa.).

[2] The ultimate result of those judgments was the cancellation of the two contracts between UNC and GAC and the award of net damages to UNC of $236,425. Should the Court wish to be informed as to the true facts underlying the entry of the Rule 37 default against GAC, the trial court's March 27, 1978 Amended Sanctions Order and Default Judgment (which is pending on appeal) is set forth in Appendix A hereto, pp. A1-22.

There also is no issue in this case as to the honesty, integrity or good faith of the New Mexico courts. Despite GAC's innuendos, there is absolutely no basis for a contention that the trial judge[3] or any member of the New Mexico Supreme Court who participated in the decision below has exhibited or is guilty of bias, prejudice or corruption.[4] GAC's accusations to the effect that the New Mexico courts, by refusing to stay proceedings in the case pending arbitration, disregarded the mandates of this Court in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) and 436 U.S. 493 (1978), are completely unfounded. Among other things, as we shall show, this Court in its second *Felter* decision expressly rejected a similar contention and held that its decisions "did not preclude the [trial] court from making findings whether GAC had waived any right to arbitrate" or "prevent the Santa

[3]The Hon. Edwin L. Felter was recently appointed to the New Mexico Supreme Court after receiving an "exceptionally well qualified" rating by the judicial selection committee of the New Mexico Bar Association. At the commencement of the litigation, GAC did disqualify the trial judge initially assigned to the case — the Hon. Santiago E. Campos, who is now a United States District Judge for the District of New Mexico. Two weeks after trial commenced GAC sought unsuccessfully to disqualify Judge Felter, which issue is pending on appeal to the New Mexico Supreme Court and is not involved here. GAC did not move to disqualify any of the members of the New Mexico Supreme Court.

[4]There also is no issue here as to the qualifications of counsel for UNC. GAC's reference (Pet. 14 n. 12) to a motion to disqualify a law firm representing UNC is pointless, except as an unwarranted effort to engender suspicion, since as GAC admits in that footnote the denial of its motion is now pending on appeal to the New Mexico Supreme Court and is not involved here. GAC's reference in the same footnote to the fact that one of UNC's attorneys formerly was a member of the New Mexico Supreme Court is even more reprehensible than its mention of the disqualification motion and is as irrelevant as the fact that one of GAC's lead attorneys, the Hon. William R. Federici, was appointed to the New Mexico Supreme Court during the pendency of this action. GAC has never sought at any time to establish that the UNC attorney's participation in the litigation was improper for that reason, that he has attempted in any way to utilize his former position to influence the actions of the New Mexico courts, or that any New Mexico court has been influenced by that fact. We categorically deny that there is any basis for any such contention, and, of course, we make no such contention with respect to Justice Federici.

Fe court, on the basis of such findings, from declining to stay its own proceedings pending arbitration in other forums." 436 U.S. at 496-97. And, as we shall also show, those findings and the denial of a stay pending arbitration are firmly grounded in the facts of record and are soundly based upon principles established by the Federal courts under the Federal Arbitration Act.

Since GAC's Statement in its petition virtually ignores the findings by the trial court, which were upheld in all respects by the New Mexico Supreme Court, and otherwise gives a highly distorted impression of the facts relevant to the judgment sought to be reviewed, a relatively full Statement on UNC's part is necessary in order to provide this Court with the facts pertinent to its decision whether to grant or deny the petition.

A. The Background to this Litigation.

In 1971, UNC and Gulf agreed to form jointly a third company — Gulf United Nuclear Fuels Corporation ("GUNF") — to manufacture and sell nuclear fuel for commercial reactors. At the time, UNC was both a major producer of uranium in New Mexico and a fabricator of nuclear fuel assemblies for light water reactors. Gulf was then in the process of developing uranium mines in both Canada and New Mexico and a high-temperature gas-cooled reactor business. UNC's contribution to GUNF was to be its fuel-assembly expertise, facilities and employees, and also two contracts and five letters of intent to supply nuclear fuel to a number of electric utilities.[5] Gulf controlled GUNF through

[5]GAC asserts that by 1971, when GUNF was formed, UNC was committed to supply the uranium that was the subject of the 1973 Supply Agreement (Pet. 8 n. 3). That statement is incorrect and was hotly disputed at trial. When UNC and Gulf agreed to form GUNF, UNC was committed to supply only a relatively small amount of uranium to Indiana & Michigan Electric Co. ("I&M") and to Commonwealth Edison for its Dresden reactor. In addition, in reliance upon Gulf's promise to supply uranium, UNC was negotiating a

its appointment of eight of the ten GUNF directors and was to contribute new capital to it. Further, Gulf was to supply uranium for the existing business contributed to GUNF by UNC, and was to supply GUNF with the uranium needed for new fuel fabrication business.[6]

Unbeknownst to UNC, in 1971 Gulf became a charter member of a uranium cartel, the purposes of which were to fix uranium prices, allocate markets and eliminate competition both from competing uranium suppliers such as UNC, and from "middlemen," such as GUNF and Westinghouse, who buy uranium for resale. This cartel controlled at least 74% of the free world's uranium. Certain of Gulf's San Diego employees, who were on the GUNF Board of Directors and later became GAC employees, actually attended cartel meetings and discussed the cartel's adverse impact on GUNF. After the cartel was formed, Gulf denied GUNF the capital and supply of uranium it had agreed to furnish, and GUNF began to sustain large losses.

Rendered vulnerable by GUNF's losses, UNC was coerced into selling its interest in GUNF to Gulf in the summer of 1973 and was forced to enter into an agreement with Gulf (the "1973 Supply Agreement") to supply GUNF and Gulf with approximately 24 million pounds of uranium over a period of years. Article XVII of the 1973 Supply Agreement contains the arbitration clause (Pet. App. 54a) which GAC relies upon in the

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contract with Commonwealth Edison for its LaSalle reactor. It also had obtained non-binding letters of intent to furnish nuclear fuels for four utilities, two of which never ripened into contracts. Contracts with Detroit Edison and Duke Power Co. were entered into by GUNF in March and November of 1973. The Duke Power contract was entered into by GUNF after UNC was no longer a stockholder in GUNF.

[6]The statements in this paragraph and in the following two paragraphs are based upon UNC's evidence at the trial.

present proceeding. Later in 1973, GUNF was merged into Gulf and, effective January 1, 1974, GAC was formed as a partnership by Gulf and Scallop Nuclear, Inc. to succeed to the assets and liabilities of Gulf's nuclear business.[7] The 1973 Supply Agreement was assigned by Gulf to GAC shortly thereafter and, in the summer of 1974, UNC entered into another agreement with GAC (the "1974 Concentrates Agreement") to supply three million additional pounds of uranium to GAC. The 1974 Concentrates Agreement did not contain an arbitration clause and is not involved here.

Disputes between GAC and UNC concerning the validity and enforceability of the 1973 Supply Agreement first arose in 1975. On August 8, 1975, after attempts between the parties to resolve those disputes proved unavailing, UNC filed an action (Case No. 50044) against GAC and its constituent partners in the Santa Fe County, New Mexico, District Court ("the first case"). The complaint sought a declaratory judgment that the 1973 Supply Agreement was void and unenforceable on the grounds that it violated New Mexico's antitrust laws and that it was obtained by Gulf by numerous acts of fraud, economic coercion and breaches of fiduciary duties owed to UNC. Excuse from performance also was asserted on the ground of commercial impracticability. Case No. 50044 was removed by Gulf to the United States District Court for the District of New Mexico on the asserted ground that the complaint stated a separate and independent claim against Gulf. Before any action was taken upon UNC's motion to remand the case to the State court, on December 31, 1975, UNC voluntarily dismissed its complaint under Rule 41(a)(1).

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[7]Scallop is a Delaware corporation. Since UNC also is a Delaware corporation, diversity of citizenship has never existed between UNC and GAC — at least until recently. In 1979 Gulf purchased Scallop's interest in GAC's uranium business, including the 1973 Supply Agreement, and diversity is now believed to exist.

F.R.Civ.P. and filed another complaint asserting the identical claims against GAC alone in the Santa Fe State Court (Case No. 50827 ["the second case"]).[8] UNC also refiled the extensive interrogatories it had served upon GAC in the first case. See Pet. App. 44a-45a, F. 3, 6.

B. GAC's Decisions to Litigate.

During the period of more than four months in which the first case was pending, neither GAC nor its member partners demanded arbitration or moved for an order staying further proceedings pending arbitration. However, they did move for extensions of time within which to respond to the complaint and interrogatories on the ground that more "time was necessary to determine whether to seek arbitration," indicating a recognition that any right to arbitration might be waived if not timely asserted. See Pet. App. 44a, F. 4 and 5.[9]

It soon became apparent from GAC's actions following the filing of the second complaint (together with the interrogatories) in the Santa Fe court, on December 31, 1975, that GAC had opted for litigation rather than arbitration, and very vigorous litigation at that. On January 14, 1976, GAC moved for an extension of time within which to answer the interrogatories. While that motion (which was granted) contained a *pro forma* statement that the extension was sought by GAC "without

[8] Contrary to the assertion of GAC (Pet. 9), UNC did not seek to avoid Federal jurisdiction by dismissing its complaint in Case No. 50044. A debatable question existed as to whether the Federal court had removal jurisdiction. Hence, a substantial risk was involved under the decision in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951), which holds that a party who removes a case and loses on the merits may urge on appeal that his own removal was improper.

[9] The arbitration clause contained in Art. XVII of the 1973 Supply Agreement (Pet. App. 54a) provides that either party may "elect" to submit disputes to arbitration.

waiving its right to demand arbitration," the extension was sought on grounds that more time was needed to prepare answers rather than to decide whether to demand arbitration. Even that reservation was not included in a written agreement made by GAC and Gulf with UNC, filed on March 12, 1976, to fully answer the interrogatories and produce documents in return for withdrawal of UNC's motion for default judgment based upon GAC's failure to answer the interrogatories within the extended time allowed by the trial court. See Pet. App. 4a-5a. And, as we point out more fully at pp. 13-15, *infra*, when GAC answered the complaint, on May 5, 1976, it specifically renounced arbitration of any issues "concerning the validity and enforceability of the 1973 Uranium Supply Agreement."

In the meantime, GAC disqualified the trial judge initially assigned to the case by filing (on January 14, 1976) an affidavit of bias or prejudice; filed (on February 23, 1976) a motion to dismiss for lack of *in personam* jurisdiction; and filed (on March 9, 1976) a motion to dismiss for failure to join indispensable parties. See Pet. App. 4a-5a. And, on January 19, 1976, GAC filed in the United States District Court for the District of New Mexico a Federal statutory interpleader action against UNC and others, requesting that court, *inter alia*, to issue a declaration as to the rights of UNC and GAC under the 1973 Supply Agreement.[10] GAC made no demand for arbitration in the interpleader action. After that case was dismissed for lack of subject matter jurisdiction, GAC noticed an

[10] On January 20, 1976, Gulf also filed an action against UNC in the New Mexico Federal District Court, alleging that UNC had contractually released the claims being asserted against GAC in the second Santa Fe case. *Gulf Oil Corporation v. United Nuclear Corporation*, No. 73-032-B (D.N.M. 1976). This case was dismissed nine months later on the ground that the issues were being litigated in Santa Fe. No assertion of a right to arbitrate was ever made during the pendency of this action.

appeal to the Tenth Circuit, which affirmed the dismissal. *General Atomic Co. v. Duke Power Co.*, 553 F.2d 53 (10th Cir. 1977).[11] See Pet. App. 45a, F. 7.

All of the foregoing litigation activities by GAC, except for the answer to the complaint, occurred before the April 2, 1976, injunction by the trial court which GAC now contends prevented it from moving that court to stay its proceedings pending arbitration. At no time during the nine months preceding April 2, 1976 — a period of time when GAC was involved with UNC in three different lawsuits concerning the 1973 Supply Agreement — did GAC give UNC or any court notice of an election that it wished to arbitrate its 1973 Supply Agreement disputes with UNC. Indeed, GAC told the trial judge during this period that ". . . New Mexico provided the only or best forum for the vindication of its rights in various matters." See Pet. App. 5a.

C. The April 2, 1976 Injunction.

On April 2, 1976, the trial court issued a preliminary injunction restraining GAC "from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action," including "the institution or prosecution of ordinary litigation, third-party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject

[11] GAC named the four utilities, as well as UNC, as parties in the interpleader. The utilities specifically disclaimed any interest in the 1973 Supply Agreement between UNC and GAC.

matter of this lawsuit, or including United Nuclear Corporation as a party thereto."[12] At the request of GAC, the injunction subjected UNC to the same restraint in regard to proceedings against GAC.[13]

On its face, therefore, that injunction affected what the parties might do "in any other forum" but did not affect what they might do in the Santa Fe court. As that court found in its December 27, 1977 order, the "injunction did not prohibit GAC from demanding arbitration with UNC in this forum." Pet. App. 47a, F. 13. Indeed, the concerns that gave rise to the injunction did not involve arbitration of the issues in this case as to the validity and enforceability of the 1973 Supply Agreement; rather, the "injunction was sought and issued in the context of GAC's announced intention of instituting litigation against UNC in other jurisdictions and of joining UNC in pending or contemplated arbitration proceedings instituted by the utilities" under arbitration clauses in their contracts with GAC *(ibid.)*. *See also, General Atomic Co. v. Felter*, 434 U.S. 12, 13-14 (1977). "What the New Mexico Supreme Court has described as 'harassment' [in upholding the injunction] is principally GAC's desire to defend itself by impleading UNC in the federal lawsuits and federal arbitration proceedings brought against it by the utilities." *Id.* at 18.

[12] GAC does not quote the full text of the ordering paragraph (Pet. 12). The paragraph is quoted in full in *General Atomic Co. v. Felter*, 434 U.S. 12, 14 n.4 (1977).

[13] On April 2, 1976, the trial court also denied GAC's motion to dismiss for lack of *in personam* jurisdiction, and at GAC's request certified the matter for an interlocutory appeal. GAC thereafter moved for a stay of proceedings pending appellate determination of the jurisdictional issue. However, GAC did not ask the trial court for a stay pending appellate review of the April 2, 1976 preliminary injunction or pending arbitration of the material disputes.

The only mention of arbitration under the arbitration clause in the 1973 Supply Agreement occurred in a hearing on April 2, 1976 concerning the form of the injunction to be entered. After GAC's counsel referred to that arbitration clause and called attention to the New Mexico Arbitration Act, there was a colloquy between the trial judge and counsel which is set forth at length in the opinion of the New Mexico Supreme Court (Pet. App. 6a-8a). GAC's counsel noted that he had "raised the question of the *possibility* of the Defendants desiring to exercise their rights to arbitration *in this case*" under the arbitration clause in the 1973 Supply Agreement and the New Mexico Arbitration Act. The trial judge asked if such arbitration would be "[s]ubject to the supervision of this court." GAC's counsel replied "*/t/hat is correct,*" and went on to "ask that the Injunction be clear in excluding any prohibition against us demanding arbitration *in this case*." (Emphasis by the Court.) UNC's counsel asserted that it was "clear enough" and assured the trial judge that UNC had not sought to enjoin such arbitration by GAC.[14] Finally, referring to the text of the proposed injunction, the trial judge advised the parties:

> I don't think there is anything in the language here that relates to arbitration in this forum pursuant to the arbitration clause contained in the contract. If there is any question about it that can be clarified.

GAC did not mention the Federal Arbitration Act or otherwise urge that it had a Federal right to arbitrate the issues as to the validity and enforceability of the 1973 Supply Agreement during the proceedings that led to the injunction (Pet. App. 6a). At no time did GAC accept the trial court's offer to

[14] UNC's counsel also noted, *inter alia*, that although he had asked repeatedly whether GAC wanted to arbitrate, GAC had never answered; and that he believed that GAC had waived arbitration, but "[t]hat is not the point that I wanted an Injunction on." Pet. App. 8a.

clarify the injunction if GAC had questions relating to arbitration (*id.* 21a). And, as we shall show, more than 19 months of intensive litigation followed entry of the injunction on April 2, 1976 before GAC, for the first time, demanded arbitration of the issues in the case as to the validity and enforceability of the 1973 Supply Agreement, moved for a stay pending arbitration and presented to the trial court a claimed right to arbitrate under the Federal Arbitration Act.

D. GAC's Failure to Seek Arbitration After April 2, 1976.

On April 14, 1976, the New Mexico Supreme Court issued an alternative writ of prohibition, in the form submitted by GAC, staying enforcement of the April 2 injunction, which stay was not quashed until June 16, 1976. *See General Atomic Co. v. Felter, supra*, 434 U.S. at 14. On May 5, 1976, while that stay was in effect, GAC filed its answer to the complaint and counterclaimed against UNC. See Pet. App. 45a-46a, F. 9. While that pleading was prefaced by an express reservation of GAC's "objection to the court's jurisdiction over its person" which objection had been overruled by the trial court on April 2 (see n. 13, p. 11 *supra*), no such reservation was made in regard to the April 2 injunction, and GAC stated its "Answer as to all matters in which arbitration is not being sought by Defendant and as to all issues which the Court may deem unarbitrable." The eighth defense of the answer contains GAC's only additional mention of arbitration.

The eighth defense (App. B hereto) included allegations that "some" unspecified "issues in this case are subject to arbitration pursuant to Article XVII" of the 1973 Supply Agreement; that UNC is also "bound by the arbitration provisions" of certain contracts between GAC and two utility companies; that the utility companies had demanded arbitration with GAC under two of those contracts and might do so on the third; and that

UNC's "obligations to General Atomic may be affected" by those arbitration proceedings. GAC went on in its eighth defense to state that it "demands arbitration" of "only" those issues which GAC is ultimately required to arbitrate with the utility companies, but:

> Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement.

The utility contracts under which GAC thus demanded arbitration with UNC in its answer to the complaint in this case were the utility contracts involved in the judicial and arbitration proceedings which provided the basis for the April 2, 1976 injunction. See p. 11 *supra*.[15] Hence, by thus demanding arbitration with UNC in regard to issues arbitrated with the utilities under those contracts, GAC made unmistakably clear that it did not regard the April 2 injunction as preventing it from demanding arbitration with UNC. And, GAC made equally clear that it did not intend to arbitrate any issues under the 1973 Supply Agreement by expressly excluding from its arbitration demand "all other arbitrable issues, including any concerning the validity and enforceability of" that Agreement. See Pet. App. 46a, F. 10. Moreover, GAC's election to litigate, rather than to

[15] Those utility contracts were between GAC and Commonwealth Edison (two contracts) and Duke Power Company. GAC and Duke settled their arbitration dispute on December 14, 1977. Commonwealth Edison gave notice of demand for arbitration with GAC, Gulf and UNC under the LaSalle reactor contract on October 29, 1974. UNC was joined by Commonwealth Edison and has been a party to the arbitration since its inception. That arbitration is still in the pre-hearing stage and, while GAC has cross-claimed against UNC, to this day, GAC and Gulf have made no claim against UNC in that proceeding relating to the validity or enforceability of the 1973 Supply Agreement. Commonwealth Edison has never demanded or instituted arbitration under its Dresden contract with GAC.

arbitrate, the issues relating to the 1973 Supply Agreement was confirmed by its counterclaim which requested the court to specifically enforce that Agreement and award actual and punitive damages for its breach and for UNC's alleged violation of the New Mexico Antitrust laws, without any reference to arbitration. See Pet. App. 45a-46a, F. 9.

GAC petitioned this Court for a writ of certiorari to review the June 16, 1976 decision of the New Mexico Supreme Court quashing its alternative writ staying enforcement of the April 2, 1976 injunction, but did not make any reference to arbitration under the Federal Arbitration Act in that petition (No. 76-385). After this Court remanded the case to the New Mexico Supreme Court "to consider whether its judgment was based upon federal or state grounds, or both," that Court reaffirmed its judgment and sustained "the injunction on the ground that its issuance was within the inherent equity jurisdiction of the Santa Fe court and was not prohibited by *Donovan v. City of Dallas*, 377 U.S. 408 . . . (1964)." *General Atomic Co. v. Felter, supra.* 434 U.S. at 14-15. It was not until May 23, 1977, when GAC filed its second petition for writ of certiorari (No. 76-1640) in this Court to review that decision, that GAC first mentioned a right to arbitration under the Federal Arbitration Act and then only in relation to joining UNC in the GAC-utility arbitrations. GAC did not rely upon that Act in the New Mexico courts until it sought, in November of 1977, the stay of proceedings under 9 U.S.C. §3 pending arbitration which gave rise to the instant petition.

During the period that followed the filing of its answer and counterclaim, GAC obtained the joinder of I&M and Detroit Edison as parties to the case,[16] and engaged in extensive pretrial discovery against UNC (*i.e.*, by taking more than 100 depositions, totalling more than 16,000 pages and involving

[16] See Respondent I& M's Brief In Opposition.

2,785 deposition exhibits, by propounding two voluminous sets of interrogatories to UNC, and by copying more than 500,000 pages of UNC's records). See Pet. App. 47a, F. 15 and 16. GAC drafted the portion of a pretrial order, entered on August 22, 1977, setting forth its claims against UNC, without referring to a claim or demand for arbitration. See Pet. App. 9a; 47a, F. 17. In September 1977, after its discovery was completed, GAC moved for summary judgment on UNC's claims of state antitrust law violation, fraud, economic coercion and commercial impracticability. The motion was denied on October 27, 1977. See Pet. App. 47a-48a. F. 18. On the following day, GAC petitioned the New Mexico Supreme Court to stay the trial of the case, which was set for October 31, 1977, on the ground that it needed more time to prepare for trial — not to arbitrate the 1973 Supply Agreement disputes. The petition was denied, and the trial commenced on the appointed date, 22 months after UNC's complaint in the second Santa Fe case was filed. See Pet. App. 48a, F. 19 and 20.

In the course of these months, GAC repeatedly sought and obtained extensions of time and discovery orders from the trial court on the asserted ground that the orders were necessary in order for it to prepare for trial. It repeatedly invoked the appellate jurisdiction of the New Mexico courts on rulings not to its liking. See Pet. App. 48a, F. 20 and 21. But, as the trial court found (Pet. App. 46a, F. 12):

> At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement.

E. GAC's Motion for a Stay Pending Arbitration.

By its *per curiam* decision of October 31, 1977, this Court granted GAC's second petition for writ of certiorari and reversed the New Mexico Supreme Court's decision approving the April 2, 1976 injunction. *General Atomic Co. v. Felter*, 434 U.S. 12 (1977). Specifically, this Court held that the Supremacy Clause and its *Donovan* decision, *supra*, prohibit a State court from enjoining a party from initiating subsequent *in personam* actions in Federal courts or invoking Federal rights. This Court did not hold, however, that GAC had a right to arbitrate disputes relating to the 1973 Supply Agreement or that GAC had not waived any such right before or after April 2, 1976, and it did not hold that the trial court's proceedings should be stayed pending arbitration.

The mandate of the New Mexico Supreme Court, following its receipt of this Court's mandate, was received by the trial court on November 28, 1977. The trial court immediately amended the April 2, 1976 injunction "to exclude from its terms and conditions all *in personam* actions in Federal courts and all other matters mandated to be excluded from the operation of said injunction" by this Court's decision.

GAC did not object to the trial court's amending order. However, GAC declared in the trial court that it intended to seek arbitration and orally requested a stay of the trial then in progress, which request was denied. See Pet. App. 48a, F. 22. On the following day, GAC filed its demand to arbitrate the validity and enforceability of the 1973 Supply Agreement disputes with the American Arbitration Association in San Diego.[17] On November 30, 1977, GAC filed a motion for a stay of

[17] At the same time, GAC also filed two other arbitration demands against UNC: the first sought to join or bring UNC into the then pending Duke-GAC arbitration proceeding, which was subsequently settled on December 14, 1977. The second demand was a GAC cross-claim against UNC in the

proceedings in the trial court pending arbitration. See Pet. App. 48a, F. 23. UNC responded on December 6, 1977, by resisting GAC's motion on waiver and other grounds and by filing a motion for an order staying arbitration. The trial court notified the parties to submit their papers on the facts and law. GAC did not object to the sufficiency of this procedure and did not tender any oral testimony or affidavits raising questions of fact regarding UNC's claim of waiver. See Pet. App. 30a.

On December 16, 1977, the trial court entered an order granting UNC's motion staying arbitration and, on December 27, 1977, the order denying GAC's motion for a stay pending arbitration was entered (Pet. App. 52a). The trial court entered substantially identical findings and conclusions in connection with both orders. On the basis of extensive findings (Pet. App. 43a-49a), the trial court concluded (Pet. App. 50a), *inter alia*, that it had jurisdiction under both the Federal and State arbitration acts "to determine whether GAC may properly demand arbitration from UNC"; that "GAC has waived any rights to demand arbitration from UNC and has been in default in exercising those purported rights"; that "the issues arising under the New Mexico Antitrust Laws . . . may not be submitted to arbitration"; and that "all issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none . . . can properly be submitted to arbitration."

The trial court entered both orders as partial final judgments to facilitate an immediate appeal, which was taken by GAC.

Commonwealth Edison arbitration proceeding to which UNC is a party. GAC's cross-claim, which was allowed by the arbitrator, seeks to prevent UNC from invoking a limitation of liability defense against Commonwealth Edison under the LaSalle reactor fuel contract — it does not relate to the validity or enforceability of the 1973 Supply Agreement.

As the New Mexico Supreme Court stated (Pet. App. 41a), only GAC's San Diego arbitration demand concerning the validity and enforceability of the 1973 Supply Agreement was considered by that court's opinion; and, as GAC makes clear (Pet. 15, 16), it is that same San Diego arbitration demand that is the sole basis of its petition here.

However, on March 3, 1978, while the appeal was pending, GAC petitioned this Court (No. 77-1237) for a writ of mandamus to the trial court to set aside *both* the December 16 and the December 27, 1977 orders on the ground that they violated this Court's earlier decision and mandate. On May 30, 1978, this Court issued its *per curiam* decision granting GAC's petition for writ of mandamus, in which it concluded that, insofar as it stayed arbitration, the December 16, 1977 order of the trial court was contrary to this Court's earlier mandate and to its decision of October 31, 1977. *General Atomic Co. v. Felter*. 436 U.S. 493 (1978).

GAC's petition had asserted that "Judge Felter's 'waiver' theory" had "already been rejected by this Court" and that it was "patently unsound" because the April 2, 1976 injunction "prevented GAC from bringing the issues under the 1973 agreement to arbitration" (Pet. No. 77-1237, at 12-13). However, the Court declined to disturb the December 27, 1977 order, since it did not prevent "GAC from pursuing its arbitration claims in other forums" (436 U.S. at 498 n. 2), and also because:

> Clearly, our prior opinion did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums. (436 U.S. at 496-97)

F. The Decision of the New Mexico Supreme Court.

The New Mexico Supreme Court's opinion affirming the trial court's December 27, 1977 decision and judgment was issued on

May 7, 1979 (Pet. App. 1a-42a). Among other things that court held:

(1) That the Federal Arbitration Act controlled the arbitration rights of the parties under the 1973 Supply Agreement and the disposition of GAC's November 30, 1977 motion for a stay in this case (Pet. App. 10a-11a);

(2) That under 9 U.S.C. §3, the trial court had the power and duty to determine whether GAC had waived its right to demand arbitration by litigation conduct amounting to a default in proceeding with arbitration (Pet. App. 11a-12a);

(3) That GAC was not entitled under the circumstances to an evidentiary hearing on the issue of waiver (Pet. App. 30a-32a);

(4) That the April 2, 1976 injunction did not prohibit GAC from moving the trial court for a stay pending arbitration or from otherwise asserting in that court a demand for arbitration (Pet. App. 20a-24a);

(5) That the record supported the trial court's findings of fact (Pet. App. 3a-10a, 19a-27a);

(6) That, under the standards established by the Federal courts, the trial court's findings of fact supported its conclusion that GAC had waived its claimed right to arbitrate (Pet. App. 12a-27a, 42a);

(7) That the State antitrust law issues were not arbitrable, and that the other issues raised were so intertwined with and permeated by the State antitrust issues that they too required litigation (Pet. App. 34a-40a);

(8) That the trial court's denial of GAC's motion to stay was not in violation of or inconsistent with this Court's decisions in the two *Felter* cases (Pet. App. 32a-34a).[18]

ARGUMENT

The principal issue before the New Mexico Supreme Court was whether, taking into account all the circumstances of GAC's conduct in the litigation, GAC was in default in proceeding with arbitration and thus was not entitled under 9 U.S.C. §3 to a stay of proceedings in the trial court pending arbitration. GAC, realizing that such a fact-bound question is not appropriate for review by writ of certiorari in this Court, strives mightily to show that the New Mexico Supreme Court somehow acted inconsistently with the decisions of this Court in the two cases captioned *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) and 436 U.S. 493 (1978),[19] and to show that the state courts decided questions of federal law upon which there are substantial divisions of authority in the lower courts. Neither attempt succeeds. This Court made entirely clear, in its second *Felter* decision, that neither that decision nor the first *Felter* decision prohibited the trial court from finding that arbitration had been

[18] GAC's account, on pages 20-21 of its petition, regarding certain other federal proceedings subsequently brought by UNC in regard to GAC's invocation of arbitration is incomplete but is entirely irrelevant here. Those actions simply represent an effort by UNC, in accordance with the decisions by this Court in the *Donovan* case and the two *Felter* cases, to seek to have the Federal — rather than State — courts prevent arbitration of matters that have already been determined in litigation. *See Donovan v. City of Dallas*. 377 U.S. 408, 412 (1964).

[19] In its first *Felter* opinion this Court held that the Supremacy Clause and its *Donovan* opinion, *supra*, prohibit a State court from enjoining a party from initiating subsequent *in personam* actions in Federal courts or invoking Federal rights. In its second *Felter* opinion this Court held that, insofar as the December 16, 1977 judgment stayed any arbitration, it was contrary to the opinion and mandate in the first *Felter* case.

waived or from denying GAC's motion for a stay pending arbitration. GAC elected to litigate rather than arbitrate for more than two years before asserting its alleged arbitration rights, although it was not prevented from moving for a stay of the trial proceedings pending arbitration at any time throughout that period. It must now bear the consequences of its own delay.[20] The decision below accords with accepted legal principles, and GAC presents no question upon which this Court should grant a writ of certiorari.[21]

1. The Waiver Finding by the Courts Below Does Not Conflict with Prior Rulings of this Court and Presents No Substantial Question for Review by this Court.

(a) There is no substance whatsoever to GAC's asserted "principal reason why certiorari should be granted" — that "UNC and the New Mexico courts are now attempting to accomplish the very same result — barring GAC's right to arbitrate — which this Court twice resoundingly condemned in" *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), and *General Atomic Co. v. Felter*, 436 U.S. 493 (1978). See Pet. 25-26; and, generally, 25-33. This Court in the *Felter* cases did not hold that GAC had a "right to arbitrate," but rather condemned state court "interfere[nce] with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. The denial by the New Mexico trial court of a stay of its own proceedings pending arbitration does not, of course, "bar" GAC from making any assertions it pleases, however erroneous,

[20] GAC's desire for arbitration of the 1973 Supply Agreement did not manifest itself in this case until November 1977, after its summary judgment motion had been denied and Rule 37 sanction motions were pending against it.

[21] We note that I&M's Brief in Opposition (with which we agree), while properly concentrating upon reasons why certiorari is not appropriate as to I&M's disputes with GAC, also demonstrates that GAC's actions in regard to those disputes are inconsistent with any intention by GAC to arbitrate issues relating to the validity and enforceability of the 1973 Supply Agreement with UNC.

in any "federal forum" it chooses regarding its "views" in regard to "its entitlement to arbitration."

In the second *Felter* case, GAC urged that both the December 16, 1977 order of the trial court staying arbitration and the December 27, 1977 order denying GAC's motion to stay trial proceedings pending arbitration violated this Court's mandate pursuant to the first *Felter* decision. GAC specifically challenged the ruling that it had waived arbitration on the ground that the ruling was contrary to this Court's mandate because some of the inconsistent litigation activities by GAC upon which that ruling was based occurred subsequent to the entry of the April 2, 1976 injunction involved in the first *Felter* decision. While this Court agreed that the December 16, 1977 order violated the Court's prior mandate, it expressly rejected GAC's contention that this was true also of the December 27, 1977 order denying a stay pending arbitration and of the waiver findings therein. See p. 19, *supra*. This Court's mandate "did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate" or "prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 497. And, this Court declined "to disturb" the December 27, 1977 judgment (436 U.S. at 498 n. 2) which is the very judgment that, as affirmed by the New Mexico Supreme Court, GAC seeks in its instant petition to have this Court review.

We do not contend, of course, that this Court in its second *Felter* decision passed upon the merits of the trial court's findings and conclusions that GAC had waived arbitration or of the denial of GAC's motion to stay proceedings in the trial court pending arbitration. But it is entirely clear, from this Court's opinion in the second *Felter* case, that the Court did not regard either the waiver determination or the denial of the motion for a stay pending arbitration to constitute a violation of this Court's mandate in the first *Felter* case, as GAC virtually admits in the

last paragraph (Pet. 32-33) of its first asserted reason for granting its petition. In short, it is GAC — not UNC or the New Mexico courts — which is now making arguments premised upon an erroneous interpretation of this Court's *Felter* decisions.[22]

(b) Once GAC's fundamental premise that the New Mexico courts have "nullified," "evaded" or otherwise violated this Court's *Felter* decisions is cleared away, GAC's other arguments concerning waiver — all of which ultimately depend upon that fundamental premise — clearly are not worthy of review by this Court. At most, those arguments turn upon the facts and circumstances of this particular case, rather than upon issues of Federal law that have general importance or as to which the courts are in conflict.

Thus, GAC does not contend that the general legal principles applied by the New Mexico Supreme Court in passing upon the waiver determination are contrary to generally accepted Federal standards. Indeed, that court fully acknowledged the "strong federal policy favoring the enforcement of arbitration agreements" (Pet. App. 12a), and the "heavy burden of proving waiver" placed upon the party asserting such a default (*id.* 13a); it relied throughout its opinion upon principles established by the Federal courts in determining whether or not a party had waived its rights to arbitration (*id.* 12a-19a).

GAC does contend that, in determining that GAC waived arbitration, the New Mexico courts erred in considering GAC's inconsistent litigation activities after the entry of the April 2, 1976 injunction because "[d]uring the time GAC was enjoined, it had no choice but to forswear federal arbitration temporarily and defend, as vigorously as possible, the litigation in Santa Fe which UNC had instituted" (Pet. 26). But apart from other weaknessess, which we discuss below, that contention depends

[22] *See* Annot. 54 L.Ed.2d 921, 925 (1979).

entirely upon GAC's interpretation of the April 2, 1976 injunction, which interpretation concededly is contrary to that of the New Mexico courts (Pet. 28-31).[23] Surely a contention that the New Mexico courts misinterpreted their own order is a unique issue that has no general importance warranting review by this Court.

(c) GAC's argument that the April 2, 1976 injunction gave it "no choice but to forswear federal arbitration temporarily and defend, as vigorously as possible, the litigation in Santa Fe" is erroneous as well as unique to this particular case.

On its face, that injunction simply restrained GAC "from filing or prosecuting any other action or actions against" UNC, including "arbitration proceedings," in "any other forum" (see pp. 10-11, *supra*) and thus in no way prevented GAC from moving the Santa Fe court for a stay pending arbitration pursuant to §3 of the Federal Arbitration Act or from otherwise apprising the trial court that GAC wanted to arbitrate rather than litigate.[24] If GAC had any doubt about that from the

[23] GAC's contention that "[w]hat GAC did after it was enjoined from seeking relief in other forums constituted 'purely necessary defensive action[s]' " (Pet. 35) is also dependent upon its interpretation of the April 2, 1976 injunction as preventing it from requesting the New Mexico trial court to stay its proceedings pending arbitration. The same weakness is exposed in GAC's reliance upon a purported "uniform rule in the federal courts . . . that the very earliest time that a defendant in a civil action need elect whether to proceed with litigation or demand arbitration is when he joins issue by filing an answer to the complaint" (Pet. 33), since GAC contends that it was prevented from making that election in its answer because of its current interpretation of the April 2, 1976 injunction (Pet. 34). Of course, both of those contentions also suffer from other defects (see pp. 29-31, *infra*).

[24] The language of 9 U.S.C. §3 and applicable authorities all indicate that, since a court proceeding was pending, GAC should have attempted to vindicate its claimed arbitration rights by seeking a stay of that proceeding pending arbitration. *See, e.g., Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972); *United Electrical, R. & M. Workers v. Oliver Corp.*, 205 F.2d 376, 385 (8th Cir. 1953); *William S. Gray & Co. v. Western Borax Co.*, 99 F.2d 239, 240 (9th Cir. 1938); Goldberg, *A Lawyer's Guide to Commercial Arbitration*, §1.06, p. 18 (ALI-ABA 1977). GAC had no need to file a formal

language of the injunction, it should have been removed by the colloquy between the trial judge and counsel during the hearing on April 2, 1976 (see p. 12, *supra*).[25]

Moreover, if GAC still had doubts, the trial judge at the conclusion of that colloquy stated, "[i]f there is any question about it that can be clarified." Yet GAC sought no clarification. As the New Mexico Supreme Court stated (Pet. App. 21a-22a):

> Although the [trial] court offered clarification of what was meant by a right to arbitrate 'in this forum,' *none was ever requested at that time or any later time, nor was any effort made to determine what the judge meant when he said that if GAC decided to exercise its rights to arbitration it would be done 'subject to the supervision of this court.'* The latter expression could be interpreted in many ways, one of which could be that the judge believed that he had the power to refuse to stay the proceedings if the evidence

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arbitration demand, whether in New Mexico or elsewhere, prior to moving for such a stay. *General Guar. Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924 (5th Cir. 1970). After a stay under 9 U.S.C. §3 is granted, there is "nothing left but to proceed to arbitration, such arbitration is effectuated by the court by staying the trial until arbitration has been had." *Donahue v. Susquehanna Collieries Co.*, 160 F.2d 661, 664 (3d Cir. 1947). *See The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 44 (1944). In short, as was done by a party in *Drake Bakeries, Inc. v. Local 50, American Bakery*, 370 U.S. 254, 266-67 (1962), GAC should have "insist[ed] upon its right to arbitrate" by "promptly . . . moving for a stay in the District Court." That GAC was aware that the April 2, 1976 injunction did not prevent it from seeking such a stay is further confirmed by its reference to the stay provisions of the New Mexico Arbitration Act at the April 2, 1976 hearing. See Pet. App. 21a.

[25] *See, American Locomotive Co. v. Chemical Research Corp.*, 171 F.2d 115, 121 (6th Cir. 1948), *cert. denied*, 336 U.S. 909 (1949), where the Court rejected a party's attempt to excuse its failure to file a motion for a stay under 9 U.S.C. §3, on the ground that it was prevented from doing so by an order staying all further proceedings pending the completion of discovery, since it "was clear from the statements of the District Judge at the time that appropriate motions would still be received and considered" and it was not reasonable in any event to construe the prior order as being intended to bar such motions.

> showed a default on GAC's part in demanding arbitration that amounted to a waiver. Another probability is that the court would want to retain jurisdiction over any contested items in the contract that were not subject to arbitration. Furthermore, the court would have the jurisdiction to inquire whether or not there was in fact a valid contract providing for arbitration. *No clarification was sought and none was thereafter offered.* (Emphasis added.)

GAC did not seek clarification or move for a stay pending arbitration. It did not move for a stay of proceedings pending review by the New Mexico Supreme Court and this Court of the April 2, 1976 injunction. GAC did not even advise UNC or the trial court that it desired to arbitrate issues relating to the validity and enforceability of the 1973 Supply Agreement. It continued to litigate, including engaging in very extensive and expensive discovery against UNC, filing a motion for summary judgment, and even commencing trial without ever apprising the trial court that it wanted to arbitrate the validity and enforceability of the 1973 Supply Agreement or even that it claimed such a right under the Federal Arbitration Act. See pp. 13-16 , *supra*. The New Mexico Supreme Court correctly summed up the impression given by the totality of circumstances in this case when it said (Pet. App. 22a):

> Common sense dictates that a litigant that has been so capably repesented by such a host of outstanding lawyers, who have meticulously handled every other infinitesimal detail, and who have verbally displayed such ferocious passion for arbitration, could have found a way to say: 'Judge, we want to arbitrate.'

Though not prevented from doing so, GAC never uttered those words until November 28, 1977, more than two years after

litigation commenced and almost a month after it had gone to trial. The determination by the New Mexico courts that GAC thereby waived arbitration was amply justified and presents no substantial federal question for this Court.

Indeed, while the courts below did not reach the issue, there is ample basis for a determination that GAC's litigation activities prior to April 2, 1976 — including the filing of the interpleader action in which GAC itself requested the courts to decide the issues relating to the 1973 Supply Agreement[26] — were, by themselves, so inconsistent with a desire to arbitrate as to constitute a default or waiver. So, too, while GAC in the first case filed by UNC sought an extension of time, before responding to the complaint and interrogatories, in which to "determine whether to seek arbitration," no such reason was asserted as the basis for similar extensions of time requested before April 2, 1976 in the present case, and GAC and Gulf entered into an agreement to answer the interrogatories and produce documents without asserting or referring to a right to arbitration. See pp. 8-10, *supra*.

In addition, when GAC filed its answer and counterclaim, on May 5, 1976, the New Mexico Supreme Court had issued an alternative writ of prohibition staying the effectiveness of the April 2, 1976 injunction. See p. 13, *supra*. GAC's eighth defense asserted in its answer included a demand for arbitration with UNC of issues that GAC might be required to arbitrate under certain of its contracts with two utility companies, so GAC plainly did not then consider the assertion of an arbitration

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[26] *See, e.g., Gutor International AG v. Raymond Packer Co., Inc.*, 493 F.2d 938, 945 (1st Cir. 1974); *Ferber Company v. Ondrick*, 310 F.2d 462, 464-65 (1st Cir. 1962), *cert. denied*, 373 U.S. 911 (1963); *Bank of Madison v. Graber*, 158 F.2d 137, 140 (7th Cir. 1946); *Galion Iron Works & Mfg. Co. v. J.D. Adams Mfg. Co.*, 128 F.2d 411, 413 (7th Cir. 1942), for the inconsistency of that action with a subsequent claim for arbitration.

demand in its answer to be barred by the April 2, 1976 injunction. Yet, GAC went on in that eighth defense to "[s]pecifically exclude from the scope of this arbitration demand . . . all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement." See pp. 13-14, *supra*. This express disclaimer of arbitration "concerning the validity and enforceability of the 1973 Agreement" by GAC in its answer obviously was not necessitated by the April 2, 1976 injunction. GAC's affirmative election to litigate the issues concerning the 1973 Supply Agreement was further confirmed by its counterclaim requesting judicial decision of those issues in its favor, enforcement of that agreement and damages. See p. 15, *supra*.

We note in this regard GAC's reliance (Pet. 33) upon a purported "uniform rule in the federal courts" that "the very earliest time that a defendant in a civil action need elect whether to proceed with litigation or demand arbitration is when he joins issue by filing an answer to the complaint." The cases cited to support that proposition are not in point for they all concern the question whether a party with a right to arbitration may file a lawsuit and then, before the other side has answered, assert its right to arbitrate. But even according to GAC's theory, it must have asserted its claimed right to arbitrate at least by the time of its answer.[27] GAC now attempts to excuse its failure to assert such a demand in its answer by reason of the April 2, 1976 injunction (Pet. 34). But as we have shown GAC certainly did not so construe that injunction when it filed its answer, and the injunction plainly did not require GAC to include in its answer

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[27] We note that GAC's January 1976 interpleader complaint seeking to litigate the validity and enforceability of the 1973 Agreement was an effective "answer" in the plainest terms to UNC's complaint in the second Santa Fe case that clearly indicated an election to litigate, and not to arbitrate, the disputes. A similar election to litigate was voiced by the January 1976 action Gulf filed against UNC seeking to litigate issues which were pending in the Santa Fe action. *See, General Atomic Co. v. Felter*, 434 U.S. at 13, n. 2.

the express waiver of arbitration.[28] Moreover, unlike the defendant in *Hilti v Oldach*, 392 F. 2d 368, 371 (1st Cir. 1968), GAC did "irrevocably lock litigious horns by filing a counterclaim" for judicial decision of the issues in its favor as well as failing in its answer to "serve [ ] notice on plaintiff of the arbitration defense." See pp. 14-15 *supra*.

(d) GAC's contention (Pet. 35) that the courts below ignored the principle that there can be no waiver of arbitration by a party who participates fully in litigation while his claim to arbitration is *sub judice*, *General Guar. Ins. Co. v. New Orleans General Agency, Inc.*, 427 F.2d 924, 929 (5th Cir. 1970), stumbles on one significant obstacle: GAC elected not to put its right to arbitrate *sub judice* until November 1977 — when it finally put the matter in issue by asking for a stay of trial proceedings pending arbitration. In the *General Guaranty Insurance Co.* case, the party seeking arbitration had moved promptly for a stay and then defended the litigation after denial of the motion. GAC's reliance on *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 20 (1972), is similarly misplaced. When that case was brought in a forum other than the one designated in a forum-selection clause, the defendant immediately moved to dismiss for that reason. That motion had not been ruled upon when it became necessary for the defendant to file an allegedly inconsistent limitation-of-liability action in the same forum if it was to avoid having its rights in that regard barred by a statute of limitations. In filing such an action, the defendant expressly reserved all rights under its motion to dismiss and reasserted its contentions as to the proper forum. 407 U.S. at 4-5. Since the defendant had "no other prudent course of action" under the circumstances, the filing of that action did not constitute a waiver of its objections to the forum. 407 U.S. at 19-20. GAC, on the other hand, neither

[28] That the April 2, 1976 injunction did not prevent GAC from asserting its claimed rights to arbitration is further demonstrated by the fact that during the pendency of the injunction, GAC sent UNC a "notice" requesting UNC to join the Duke arbitration and purporting to "vouch" UNC into that arbitration. The trial court ruled that GAC's arbitration notice was not a violation of the injunction.

filed a motion for a stay pending arbitration or otherwise asserted in the trial court a contention that arbitration was the proper forum until after it had engaged in the inconsistent litigation activities found to constitute a waiver of litigation.

The only relevance of those cases for present purposes, therefore, is to illustrate that there was a course of action which GAC could have followed both to assert a contention that arbitration was the proper forum and to preserve its rights on appeal if such a contention had been denied by the trial court. But since GAC did not follow that course or otherwise assert that the issues as to the validity and enforceability of the 1973 Supply Agreement should be arbitrated, rather than litigated, until after it had waived arbitration through inconsistent conduct of litigation, those cases inferentially support rather than conflict with the decision by the courts below in this case.[29]

2. An Evidentiary Hearing Was Not Required in the Circumstances.

GAC complains that it was refused an evidentiary hearing on the "waiver" issue in violation of the Federal Arbitration Act and due process (Pet. 36). Though GAC raised the issue for the first time on appeal, the New Mexico Supreme Court addressed the merits of GAC's claim and held that the hearing in the trial

[29] GAC's contention (Pet. 36-38) that the trial court should have vacated all its proceedings since entry of the April 2, 1976 injunction, by reason of this Court's decision in the first *Felter* case, is too frivolous to deserve more than a footnote. That injunction did not involve or relate to a stay of proceedings in the trial court, but only concerned a stay of proceedings in other forums. This Court's first *Felter* decision was similarly restricted, as the Court made clear in second *Felter*. See pp. 22-23, *supra*. Indeed, GAC did not object to the order entered by the trial court pursuant to the mandate in the first *Felter* case. See p. 17, *supra*. If GAC had been erroneously denied a requested stay of proceedings in the trial court by the April 2, 1976 injunction, its present contention would at least be relevant, but that did not occur.

court was "'appropriate to the nature of the case'" (Pet. App. 30a-32a), without reaching the issue of whether "GAC waived its right to a hearing by failing properly to object and alert the court to the right, if it had such right . . . ." (Pet. App. 32a).

Section 6 of the Federal Arbitration Act (9 U.S.C. §6) states that except where otherwise provided, applications under the Act are to be "made and heard in the manner . . . for the making and hearing of motions." The only exception to §6 is §4, which is inapplicable here since GAC's application to stay the trial was made under §3 of the Act.[30] "Motions may be decided wholly on the papers, and usually are," and a trial court does not abuse its discretion by so proceeding under §3. *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362, 365-66 (2d Cir. 1965).

As set forth in the New Mexico Supreme Court's opinion, the trial court received extensive briefs from both sides on the waiver issues, both factual and legal,[31] the trial court had "virtually lived" with the case for over two years, the trial was in its second month and both sides submitted proposed findings of fact and conclusions of law (Pet. App. 32a). Moreover, GAC's acts of waiver occurred either in open court or were reflected in pleadings and other papers reposing in the court file, the contents of which were not subject to dispute. As noted in *Graig Shipping Co. v. Midland Overseas Shipping Corp.*, 259 F. Supp. 929, 931 (S.D.N.Y. 1966), it is the "objective manifestation of the record"

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[30] The two cases relied upon by GAC, *A/S Custodia v. Lessin International, Inc.*, 503 F.2d 318 (2d Cir. 1974) and *El Hoss Engineer. & Transport Co. v. American Ind. Oil Co.*, 289 F.2d 346 (2d Cir.), *cert. denied*, 368 U.S. 837 (1961), both involved §4 of the Act which provides that "the court shall proceed summarily to trial" of issues under §4 as to the making or performance of an arbitration agreement. Neither case involved a determination of waiver by participation in judicial proceedings under §3 of the Act.

[31] In addition to the briefs, the parties submitted whatever documentary evidence they thought relevant to the waiver issue.

that is the test for waiver of arbitration through participation in judicial proceedings. GAC never tendered any witnesses or identified any additional evidence it wanted to present. See p. 18, *supra*.[32] In these circumstances, the hearing held was indeed "appropriate to the nature of the case," which is what due process requires. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). *See, e.g., Goss v. Lopez*, 419 U.S. 565, 578-79 (1975).

3. The New Mexico Courts Had Jurisdiction to Decide the Waiver Issue.

Section 3 of the Federal Arbitration Act expressly provides that the court in which a case is pending may grant a party's application for a stay pending arbitration, if the court is satisfied that the issue involved is referable to arbitration under a written arbitration agreement, *"providing the applicant for the stay is not in default in proceeding with such arbitration."* 9 U.S.C. §3 (emphasis added). Hence, the New Mexico Supreme Court correctly concluded (Pet. App. 12a) that §3 "clearly mandates that a court in which a case is pending, and a stay is requested for arbitration, has jurisdiction to determine whether the movant is 'in default in proceeding with such arbitration'" and that, accordingly, the trial "judge was not in error in assuming jurisdiction to decide the question of waiver." As was pointed out in *Cornell & Company v. Barber & Ross Company*, 360 F.2d 512, 513 (D.C. Cir. 1966), in a *per curiam* opinion by a panel that included Chief Justice (then Judge) Burger, a party who "waives his right to arbitrate when he actively participates in a lawsuit or takes other action inconsistent with that right . . . is necessarily 'in default in proceeding with such arbitration.'"

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[32] Even in its petition, GAC does not point to any facts which are in dispute or what evidence it would present through witnesses.

GAC urges, nonetheless, that this jurisdictional ruling by the court below "conflicts with this Court's decisions which relieve the judiciary of that burden and shift the determination [of the waiver by participation in litigation issue] to the arbitration tribunals voluntarily selected by the parties" (Pet. 39). None of the cases cited, however — *Operating Engineers v. Flair Builders Inc.*, 406 U.S. 487 (1972); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 338 U.S. 395 (1967) — either involved or referred to the determination of an issue as to whether an applicant for a stay under §3 of the Federal Arbitration Act is "in default in proceeding with such arbitration," whether by reason of waiver or otherwise, and those cases are fully consistent with the decision below.[33]

GAC also contends (Pet. 40-41) that the "courts of appeals are divided over whether a court may consider and decide that a party has waived arbitration by delaying its demand," and cites *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2d Cir. 1965), for the proposition that the "Second Circuit has taken the position that issues of waiver are for the arbitration panel." In fact, there is no such split of authority and *World Brilliance* does not conflict either with the decision below or with the decisions of other courts of appeals.

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[33] Both *Flair* and *Livingston* concerned the enforceability of arbitration clauses in collective bargaining agreements pursuant to §301 of the Labor Management Relations Act (29 U.S.C. §185). They held that claims that arbitrable grievances were barred by laches *(Flair)* or by non-compliance with grievance procedures *(Livingston)* are for the arbitrator to decide, but only if the court first determines that "the parties are subject to an agreement to arbitrate" (406 U.S. at 491) and thus "are obligated to submit the subject matter of the dispute to arbitration" (376 U.S. at 557), a situation that would not exist if arbitration had been waived by inconsistent judicial proceedings. *See, e.g., Reid Burton Const. v. Carpenters District Council*, 535 F.2d 598, 603-04 (10th Cir.), *cert. denied*, 429 U.S. 907 (1976). Neither *Flair* nor *Livingston* involved a waiver situation caused by participation in inconsistent judicial proceedings. And, while *Prima Paint* held that a claim of fraud in the inducement of the entire contract was for the arbitrator to decide under §4 of the Federal Arbitration Act, it recognized that "issues relating to the making *and performance* of the agreement to arbitrate" (388 U.S. at 404, emphasis added), including fraudulent inducement of the arbitration clause itself, are for the courts to determine. The "performance" of an arbitration clause seems clearly to embrace issues as to whether arbitration has been waived in a manner that constitutes a "default" under 9 U.S.C. §3. Insofar as they are at all relevant, therefore, those cases support the decision below. In a decision more directly in point, *Shanferoke Coal & Supply Corp. v. Westchester S. Corp.*, 293 U.S. 449, 453-54 (1935), this Court held a claim that the defendant "waived its rights under the arbitration clause by unreasonable delay in demanding arbitration" to be "without merit" for "reasons . . . sufficiently stated in the opinion of the Court of Appeals." This Court thus affirmed on the merits the ruling in *Shanferoke Coal & Supply Corp. v. Westchester S. Corp.*, 70 F.2d 297, 299 (2d Cir. 1934), that the defendant's delay was not sufficient to constitute a "default of proceeding with such arbitration," rather than holding that the issue was for the arbitrator to decide under §3 of the Federal Arbitration Act. *See also, Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 989 (2d Cir. 1942), where the Second Circuit recognized that a "waiver" constituting a "default" under §3 would result from inconsistent judicial proceedings, so as to bar a stay pending arbitration. GAC's reliance on the *Shanferoke* and *Kulukundis* cases (Pet. 41 n. 28) is, therefore, unwarranted.

World Brilliance arose under §4, rather than §3, of the Federal Arbitration Act, and the "waiver" claim that it held was for the arbitrator to decide arose not out of conduct in judicial proceedings, but simply out of delay in instituting the proceeding to compel arbitration. In a subsequent case where — as here — the claim of "waiver" was based on a party's participation in judicial proceedings, the Second Circuit decided the issue on the merits and held that arbitration had been waived. *Demsey & Associates v. S. S. Sea Star*, 461 F.2d 1009, 1017-18 (2d Cir. 1972). The relevant distinction was forcefully pointed out in *N&D Fashions, Inc. v. DHJ Industries*, 548 F.2d 722, 728 (8th Cir. 1977), which noted that " 'waiver' in the present context can have two distinct meanings," and stated that:

> First, 'waiver' can mean that the party proceeding under §3 'is . . . in default in proceeding with such arbitration,' and

so under the terms of the Arbitration Act is not entitled to a stay. This is a question for determination by the courts. *Halcon International, Inc. v. Monsanto Australia Ltd.*, 446 [sic; 446] F.2d 156, 161 (7th Cir.), *cert. denied*, 404 U.S. 949 . . . (1971); *Cornell & Co. v. Barber & Ross Co.*, 123 U.S.App.D.C. 378, 360 F.2d 512 (1966). A default occurs when a party 'actively participates in a lawsuit or takes other action inconsistent with' the right to arbitration. *Cornell & Co. v. Barber & Ross Co., supra,* 360 F.2d at 513. . . .

Alternatively, 'waiver' can be used in the sense of 'laches' or 'estoppel.' In this sense, waiver applies to bar arbitration when the process would be inequitable to one party because relevant evidence has been lost due to the delay of the other. *Trafalgar Shipping Co. v. International Milling Co.*, 401 F.2d 568, 571 (2d Cir. 1968). Waiver in this 'laches' sense is generally an issue for the arbitrator, . . .

As the Seventh Circuit noted in the *Halcon International* case cited in the above quotation, *World Brilliance* involved "'[w]aiver' in the laches or estoppel sense, rather than in the default sense or participating in judicial proceedings . . ." 446 F.2d at 161. *See also, Weight Watch. of Quebec Ltd. v. Weight W. Int., Inc.*, 398 F. Supp. 1057, 1058-59 (E.D.N.Y. 1975); *In re Tsakalotos Navigation Corp.*, 259 F.Supp. 210, 212-13 (S.D.N.Y. 1966). In every case to our knowledge in which arbitration is claimed to have been waived by conduct in judicial proceedings, rather than by extrajudicial delay in demanding arbitration, the courts have determined the claim on the merits.[34]

[34] In addition to the decisions cited herein, *see also, e.g.*, those cited in n. 2 to the opinion of the New Mexico Supreme Court and accompanying text (Pet. App. 12a). The cases cited in n. 1 of that opinion (Pet. App. 11a) involved delay in invoking arbitration unrelated to participation in inconsistent judicial proceedings.

Consequently, the decision by the New Mexico courts that they had jurisdiction to decide the issue in this case is consistent with all relevant authority as well as with the express language of §3 of the Federal Arbitration Act, and the issue is not one which deserves further review by this Court.

4. The State Antitrust Issues, and Other Issues Intertwined Therewith, Are Not Arbitrable Under the Federal Arbitration Act.

The Federal courts have consistently held that Federal antitrust issues are not arbitrable under the Federal Arbitration Act.[35] The New York courts have held that State antitrust issues are not arbitrable under the New York arbitration act.[36] One Federal court has held that State antitrust issues are not arbitrable under the Federal Arbitration Act.[37] This appears to be the second case in the 54 years since the Federal Arbitration Act was enacted in 1925 (43 Stat. 883) in which an issue has arisen as to whether State antitrust issues are arbitrable under that Act. Both of the courts below held that the issues as to violation by GAC of New Mexico's antitrust laws are not arbitrable under the Federal Arbitration Act, and that the other issues in dispute are so intertwined with those antitrust issues that arbitration of those issues also is inappropriate. See Pet. App. at 34a-40a. This holding constituted an independent ground

[35] *E.g., Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116, 117 (7th Cir. 1978); *Cobb v. Lewis*, 488 F.2d 41, 47 (5th Cir. 1974); *American Safety Equipment Corp. v. J. P. Maguire & Co.*, 391 F.2d 821, 825-28 (2d Cir. 1968); *A.&E. Plastik Pak Co. v. Monsanto Company*, 396 F.2d 710 (9th Cir. 1968).

[36] *Aimcee Wholesale Corp. v. Tomar Products, Inc.*, 21 N.Y.2d 621, 237 N.E.2d 223 (1968). The Federal Arbitration Act (9 U.S.C. §1 *et seq.*) is patterned after the New York act. *See, Shanferoke Coal & Supply Corp. v. Westchester S. Corp., supra,* 70 F.2d at 298.

[37] *Fox v. Merrill Lynch & Co., Inc.*, 453 F. Supp. 561 (S.D.N.Y. 1978).

for the denial of a stay pending arbitration which is, in itself, sufficient to support that denial regardless of the correctness of the rulings below on the other issues.

The fact that this appears to be only the second case in which the issue has arisen in over 54 years is sufficient in itself to demonstrate that the ruling below does not have the kind of general importance which might warrant review by this Court. Since the other case reached the same result, the possibility of a conflict in decisions does not exist. And, the analogous authority afforded by the decisions in regard to arbitration of Federal antitrust issues and to arbitration of State antitrust issues under the New York arbitration act, as well as other decisions cited by the New Mexico Supreme Court (Pet. App. 34a-40a), provide persuasive support for the decision below.

GAC does not question the validity of those analogous decisions, but contends in effect that they are not analogous. It asserts (Pet. 42) that it is "one thing to reconcile conflicting federal statutes by exempting federal antitrust issues from the federal arbitration statute; it is quite another to reconcile conflicting federal and state statutory policies by giving the state policy precedence", and contends that the "New Mexico Supreme Court has, in effect, held the Federal Arbitration Act to be preempted by the New Mexico Antitrust Act."

That argument is entirely mistaken. The decisions holding Federal antitrust issues inarbitrable are not based upon some express or implied exemption in those antitrust laws from the provisions of the Federal Arbitration Act. They are based, rather, upon the fact that antitrust issues are "of a character inappropriate for enforcement by arbitration" and that the Congress thus did not intend, in the Federal Arbitration Act, to subject them to arbitration. *Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116, 117 (7th Cir. 1978) quoting

American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821, 825 (2d Cir. 1968). The reasons for that conclusion, as initially expressed in *American Safety Equipment Corp.* and summarized in *Cobb v. Lewis*, 488 F.2d 41,47 (5th Cir. 1974) and in *Applied Digital Tech.*, 576 F.2d at 117, are as follows:

> The first is the broad range of public interests affected by private antitrust claims. The Court [in *American Safety Equipment Corp., supra*] recognized that '[a] claim under the antitrust laws is not merely a private matter', because private antitrust actions are an integral part of the effort of the antitrust laws 'to promote the national interest in a competitive economy.' 391 F.2d at 826. The Second Circuit noted that it is doubtful Congress could have 'intended such claims to be resolved elsewhere than in the courts'. *Id.*, at 827. The second is the complexity of the issues and the extensiveness and diversity of the evidence antitrust claims usually involve. These render antitrust claims 'far better suited to judicial than to arbitration procedures.' *Id.* The third is the questionable propriety of entrusting the decision of antitrust issues to commercial arbitrators, who 'are frequently men drawn for their business expertise', when 'it is the business community generally that is regulated by the antitrust laws'.

The New York Court of Appeals relied upon these same considerations, and others, in concluding that the New York arbitration statute was not intended to require arbitration of State antitrust issues. *Aimcee Wholesale Corp. v. Tomar Products, Inc., supra,* 237 N.E.2d at 224-27. And, the New Mexico Supreme Court concluded that those considerations are equally applicable to issues arising under the New Mexico antitrust laws, which reflect the same public policy as do the

Federal antitrust laws of "promoting the national interest in a competitive economy." Pet. App. 36a.[38] In short, this case does not involve a preemption or evasion of the Federal Arbitration Act by inconsistent State laws, but an interpretation of that Act as not requiring arbitration of State antitrust issues for the same reasons that the Act concededly does not require arbitration of Federal antitrust issues.

The New Mexico Supreme Court held (Pet. App. 40a) that the trial court "did not abuse its discretion in holding that all the issues in this case are so intertwined with the antitrust issues that no issues are arbitrable", because:

> The standard of review is whether the trial court abused its discretion. *Applied Digital, supra; A. & E. Plastik Pak Co., Inc. v. Monsanto Co.*, 396 F.2d 710 (9th Cir. 1968). A review of the record in this case clearly indicates that the issues are 'complicated, and the evidence extensive and diverse. . . .' *American Safety Equipment*, 391 F.2d at 827. It would not be 'easy for an arbitrator to separate the antitrust issues from the other issues in the case, and to proceed to decide the arbitrable issues without inquiry into the antitrust issues.' *Cobb*, 488 F.2d at 50.

The New Mexico Court thus applied the standards established in decisions by the Federal courts in deciding this issue, and concluded after "a review of the record" that the trial court had not abused its discretion.

GAC does not question the standards thus applied by the New Mexico Supreme Court, but seems to contend (Pet. 43-44) that the Court "declined to engage in this practical analysis" as to

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[38] As noted by the New Mexico Supreme Court (Pet. App. 36a), it is federal policy, clearly expressed by the Congress, to promote and finance state antitrust enforcement.

whether litigation or arbitration should proceed first. But, since the trial court and the New Mexico Supreme Court, with their extensive experience with the issues and facts involved in the case, concluded that none of the other issues could practicably be separated from the antitrust issues, there was no need to decide whether arbitration or litigation should proceed first. The lower courts were well aware that the facts underlying UNC's antitrust claims were also common to its claims of fraud, breach of fiduciary duties, economic coercion and others. In circumstances where antitrust issues and other issues are "inextricably intertwined," it is obviously proper for a court to proceed with the trial and thus to deny a stay pending arbitration. *See, e.g., Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d at 117-19; *Cobb v. Lewis*, 488 F.2d at 49-50; *Hunt v. Mobil Oil Corp.*, 410 F.Supp. 10. 26-27 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
Plaintiff,

vs.

GENERAL ATOMIC COMPANY, *et al,*
Defendants.

AMENDED SANCTIONS ORDER AND DEFAULT JUDGMENT

This matter coming before the Court upon motions for sanctions and for the granting and entry of default judgments against defendant, General Atomic Company, for its failure to comply with discovery laws and orders of the Court, a motion for an evidentiary hearing upon part of the motions relating to requested sanctions, responses to the aforesaid motions, supporting affidavits and documents, and argument and authorities made and submitted by the various parties; the Court having given due study and consideration to all of the foregoing, and to the whole record and history in this litigation, including all hearings conducted on discovery questions throughout the period from December 31, 1975, to the present; the Court having further reviewed all relevant pleadings, interrogatories and answers thereto, and other relevant and credible documents and materials in this case, as well as pleadings in other related court cases; based upon all of the foregoing, this Court now concludes that the defendant, General Atomic Company, has followed a

conscious, willful and deliberate policy throughout this litigation, which continues to the present time, in cynical disregard and disdain of the Rules of Procedure relating to discovery and this Court's discovery Orders, of concealing rather than in good faith revealing the true facts concerning the international uranium cartel in which Gulf Oil Corporation was involved and which through its subsidiaries, officers, agents and affiliates, including defendant, GAC, participated, from an as yet undetermined time, but for not less than from and during 1972 into 1975; the aforesaid policy of defendant, GAC, of hiding that information from the Court and opposing counsel, and in consequence thereof, the exercise of the utmost bad faith in all stages of the discovery process up to the present time, leads the Court to the inescapable conclusion that at this late date, the Court's discovery Orders will not be complied with by the defendant, GAC, and that this Court is powerless to secure unto all parties to this case either due process of law or a fair trial based upon equality and parity of right and duty unless sanctions under Rule 37 are imposed by the Court at this time. To require the other parties to this case to proceed further upon the trial on the merits at this time, other than upon a consideration of damages, disadvantaged as they are by the lack of discovery and GAC's failure to provide discovery, would result in a grave injustice unto all parties to this action other than GAC and a cynical denial of equal protection of the law unto them; the factual basis for imposing sanctions under Rule 37 appears from and is documented by the "Recitals" which are hereinafter set forth, which manifestly appear from the face of the record herein, without any need or requirement for an evidentiary hearing or other form of additional delay in giving effect to Rule 37, to-wit:

RECITALS

(1) On December 31, 1975, United Nuclear Corporation, plaintiff herein, by motion and leave of the Court, filed its First Set of Interrogatories to General Atomic Company in this action. Those Interrogatories were identical in scope to UNC'S interrogatories filed in Cause No. 50044, Santa Fe County District Court. The definition section of those interrogatories filed herein, as well as certain questions, specifically requested information from the constituent partners of GAC, Gulf Oil Corporation and Scallop Nuclear, Inc. Those definitions were not objected to within the time allowed by Rule 33 of the New Mexico Rules of Civil Procedure, and, indeed, were never objected to by GAC.

(2) In UNC's First Set of Interrogatories, UNC asked, *inter alia*, that GAC:

> "32. Identify all agreements and all past, pending or contemplated negotiations of the partnership or the partners, directly or indirectly pertaining to the processing of uranium-bearing ores into U_3O_8 the conversion thereof into UF_6 or any other form, and the marketing and sale of all such uranium-bearing products.
>
> "34. Identify all studies, evaluations, projections and other data pertaining to uranium ore reserves, the mining and milling thereof, the further processing and conversion of uranium and the marketing and sale of all such uranium products."

Such information was relevant and material to the repeated allegations in UNC's Complaint that the 1973 Uranium Supply Agreement and 1974 Uranium Concentrates Agreement were executed in violation of §§49-1-1 and 49-1-2 NMSA 1953 of the New Mexico antitrust statutes.

As to UNC's First Set of Interrogatories, GAC requested and received an extension of time in which to respond.

(3) GAC neither answered nor objected to the Interrogatories within the time allowed, and UNC failed its First Application for Default Judgment on March 10, 1976. On March 12, 1976, the parties entered into an Agreement signed by counsel for UNC, GAC and Gulf Oil Corporation in which UNC agreed to withdraw its Application for Default Judgment, and GAC agreed to "answer in good faith all interrogatories to Defendant presently pending in this action," and to produce documents. No objection was made to the fact that information concerning Gulf Oil Corporation was requested, or that Gulf Oil Corporation was obligated by the terms of this Agreement to produce relevant documents. The agreement between the parties expressly referred to "Gulf Correspondence" as one category of documents which GAC agreed to provide. Said Agreement was entered into with Gulf Oil's knowledge and approval, its attorney having executed same.

(4) The documents generated by the cartel's Secretariat, telexes by the Secretariat, documents of the Canadian producers' group, as well as internal Gulf documents concerning the cartel were, at the time of the March 12, 1976 Agreement, subject to UNC's Interrogatories and the Agreement to produce. At that time, most or all of these documents were in the files and custody of Gulf Minerals Canada, Limited, a wholly owned subsidiary of Gulf Oil Corporation, and included within the scope of UNC's First Interrogatories, in Canada, and no law of the United States or Canada prohibited their production.

(5) Rather than answering the Interrogatories fully, or producing the Gulf cartel documents which was within the ambit and requirement to furnish of its March 12, 1976 Agreement,

GAC instead filed on April 2, 1976 wholly inadequate and evasive answers to the Interrogatories. In response to UNC's interrogatory No. 69 (first set) which asked GAC when the business records of Gulf and Scallop would be produced for inspection and copying, GAC, under oath answered that it would produce those records for inspection and copying on June 20, 1976.

(6) In response to GAC's Motion to Stay Further Proceedings, this Court held on April 30, 1976, that the "parties are bound by their agreements," and that GAC was obligated to provide full discovery as contemplated by the March 12, 1976 Agreement.

(7) From March 12, 1976, forward, GAC neither identified nor produced cartel documents or information in the possession of Gulf Oil Corporation and its subsidiaries, despite its Agreement to do so, and the Order of the Court on April 30, 1976, that it comply with that Agreement.

(8) On August 6, 1976, UNC filed its Second Motion for Default Judgment for GAC's failure to answer UNC's Interrogatories propounded on December 31, 1975, and its failure to abide by the March 12, 1976 Agreement and the Court's April 30, 1976 Order. In response to that Motion, GAC represented to the Court that "complete and full effort has been made to cooperate with the demands of Plaintiffs in document discovery and such attempts have gone fully beyond any good faith requirements by the Rules of Civil Procedure or agreement of the parties."

(9) From December 31, 1975, the date UNC's Interrogatories were filed in this case, through September 23, 1976, the date the Canadian government passed the Uranium Security Regulations, GAC never informed this Court or UNC about the existence of the international uranium cartel; Gulf Oil

Corporation's participation therein; or about the Gulf documents relating thereto in Canada.

(10) Despite its agreement and this Court's Order to produce Gulf documents, GAC willfully, intentionally and in bad faith covered up the fact of Gulf Oil Corporation's participation in an international uranium cartel from at least 1972 into 1975, which include years in which it was in a joint venture with UNC, viz., Gulf United Fuels Corporation (GUNF). GAC thereby deliberately concealed the existence of evidence which it knew to be highly relevant to the antitrust issues pleaded in UNC's Complaint and stressed by counsel throughout the discovery period. This intentional and willful action was a violation of UNC's discovery rights and the Orders of this Court.

(11) The Court repeatedly has warned that all parties are obligated to make full disclosure in good faith to discovery requests. On several occasions since the beginning of litigation, the Court has told all parties that it expected a good faith, non-evasive and full compliance with discovery. The Court also warned on November 30, 1976, and again on March 3, 1977, that it would apply sanctions provided under Rule 37 of the New Mexico Rules of Civil Procedure for *any party's failure to make discovery in good faith.*

(12) UNC's Second Set of Interrogatories, the discovery subject matter of which also was clearly within the ambit and requirement of its First Set of Interrogatories filed on December 31, 1975, were served on August 16, 1977. A good faith, non-evasive response by GAC to said First Set of Interrogatories would have, in whole or in part, eliminated the necessity for the Second Set of Interrogatories. The Second Set of Interrogatories requested full disclosure and commitment to a set of specific facts by GAC concerning its and Gulf's cartel activities, and requested identification of all documents relevant to each interrogatory.

(13) UNC also filed a Motion to Produce all documents indentified in GAC's Answers to Interrogatories on August 16, 1977.

(14) GAC objected to UNC's Second Interrogatories on August 23, 1977, most of which objections were overruled. On September 9, 1977, this Court held a hearing on additional objections by GAC to UNC's Second Set of Interrogatories, most of which were also overruled. GAC was ordered to answer by September 20, 1977. In a hearing before the Court on September 20, 1977, counsel for GAC requested an extension of time in which to answer said Interrogatories on the ground that the extension would enable counsel to provide "full and good faith" answers to the Interrogatories. The extension was granted, and on September 26, 1977, GAC filed its first Answers to UNC's Second Set of Interrogatories.

(15) GAC's first Answers consisted in a large measure of a "do-it-yourself" kit, merely directing UNC to deposition pages from which it was supposed to discover the answers to its interrogatories. This Court, on October 11, 1977, held that GAC's Answers were "defective, incomplete, inadequate and unacceptable." GAC was again ordered to answer the Interrogatories, and to give full and good faith discovery.

(16) On October 20, 1977, GAC filed its Second Answers to UNC's Interrogatories. Those "Answers" excluded all information contained in the Gulf documents in Canada, and did not identify the documents as GAC had been ordered to do on October 11, 1977.

(17) On December 9, 1977, Indiana and Michigan, Detroit Edison and UNC joined in moving to compel further answers to UNC's Second Set of Interrogatories.

(18) After consideration of all briefs filed by GAC and others, this Court held that the answers made and filed by GAC to date had not complied with the Court's orders to make complete, good faith, and non-evasive answers to UNC's Second Set of Interrogatories. The Court therefore again ordered GAC "completely, in good faith, and without evasion" to answer each of the interrogatories enumerated in Finding No. 3 of the Court's December 27, 1977, Order. The Court also specifically gave notice in its December 27, 1977, Order that if GAC failed or refused to comply with that Order of the Court, any aggrieved party could apply to the Court for appropriate relief under Rule 37.

(19) GAC obtained from the Court two extensions of time in which to answer UNC's Interrogatories, and filed its Second Supplemental Answers on February 1, 1978. The Court has examined the answers so filed and finds them unresponsive and evasive to the questions asked, and mere legal argument in many of such answers. The series of Interrogatory Answers filed by GAC, after six months shows disdain for this Court's Orders that all parties make good faith discovery. Those answers so filed, coupled with what had gone before them, constitute, in effect, obstruction of justice, and demonstrate a willful, deliberate and flagrant scheme of delay, resistance, obfuscation and evasion in discovery matters.

(20) The latest answers filed by GAC also violate the express terms of the Court's Order of October 11, 1977, wherein the Court held that the deposing party is entitled to obtain from the deponent party a commitment to a set of facts, posture or position on the subject matter of the Interrogatory. Rather than committing to a set of facts, GAC instead simply has stated that various cartel documents cited by I & M, which GAC had failed to mention in its Second Answers, "purport to" reflect certain events. GAC steadfastly has refused and refuses to admit that

such events took place, or to state the true facts concerning the cartel, and Gulf's participation in it.

(21) By reason of the entire history relating to the manner of fulfilling its discovery requirements since the filing of UNC's First Set of Interrogatories on December 31, 1975, the Court concludes that it is hopeless to expect that GAC will in "good faith and without evasion" comply with the discovery requirements of the New Mexico Rules of Civil Procedure or this Court's Orders. GAC has willfully, intentionally, deliberately and in bad faith, failed and refused to answer UNC's Second Set of Interrogatories. UNC and the other parties to this suit have been irreparably prejudiced by this failure. Any party to any civil action is entitled to have and rely upon good faith discovery in the preparation and presentation of its case in chief and not at the end of the trial on its merits when such discovery is of little or no value to such party. If there can be any sanctions for non-discovery and if Rule 37 has any meaning, a party unlawfully deprived of discovery is entitled to those sanctions early and as a part of its case in chief and not at the end of the trial on its merits, whereby the innocent victim party would suffer the jeopardy of a motion for dismissal under Rule 41 (or for a directed verdict) without having the discovery to or sanctions to counter such a motion. It is now too late to expect answers or discovery in time to serve the purposes of the discovery rules and the Rules of Civil Procedure. This Court, in the interests of justice and fairness to all parties, and in order to enforce equality within the judicial process, must, at this time, apply appropriate sanctions for non-discovery specifically provided for in Rule 37 of the New Mexico Rules of Civil Procedure.

(22) GAC is under a duty to produce all documents to UNC which are or may be relevant to any of the Interrogatories asked in UNC's First Set of Interrogatories and even more particularly delineated and asked in UNC's Second Set of Interrogatories,

including but not limited to any documents relevant under questions 30 through 34 of the First Set of Interrogatories.

(23) GAC has represented to the Court and to all parties on several occasions that UNC had all documents which were relevant to the cartel or other issues raised in UNC's Interrogatories.

(23-A) GAC, as well as all parties to this action has been under a continuing obligation to update answers to interrogatories and to continue to produce documents in this litigation as their existence became known. In early January, 1978, GAC produced additional cartel documents to the U.S. Grand Jury in Washington, D.C. and to Westinghouse Electric Corporation. GAC, in bad faith, failed to reveal the existence of these documents to this Court or to the parties to this case, until after UNC had learned of their existence from a third party and made a demand upon GAC.

(24) The facts hereinabove set forth display a pattern and practice of GAC and Gulf to conceal documentary evidence of Gulf's and GAC's anti-trust activities and to subvert the discovery processes of this Court. GAC has deliberately failed to produce highly relevant documentary evidence. GAC has deliberately failed to inform this Court and the other parties, in a reasonably timely manner, of actions taken by another court in another jurisdiction which had a direct bearing upon the existence and materiality of such evidence. On August 10, 1977, Judge Snyder entered an order de-privileging, making public and holding outside the scope of the attorney-client privilege, approximately 41 of the 84 documents turned over to him by Gulf Oil Corporation for inspection in the Federal District Court in Pittsburgh, Pennsylvania. Despite the fact that the same law firm which represents GAC in this action represented Gulf before Judge Snyder in the Federal case in Pittsburgh, this matter

inexplicably was not brought to this Court's attention promptly by GAC. GAC never accurately disclosed to the Court nor to UNC the existence of all 84 of the documents turned over by Gulf to Judge Snyder in the Westinghouse litigation. The existence of most of those documents was not disclosed to the Court or to UNC until over one year after they were called for by UNC's First Set of Interrogatories and the agreement of the parties on March 12, 1976. The existence of some of the Snyder documents was not disclosed to the Court or to UNC until after Judge Snyder held them to be public and outside the scope of the attorney-client privilege. It was not until after UNC brought the matter of the Snyder order up in open court on October 7, 1977 and this Court's subsequent order that GAC first identified and turned over to UNC some of the Snyder documents. The failure to reveal the existence and identity of all of the Snyder documents in a timely manner in this case, was a deliberate attempt to further conceal the existence and identity of that evidence and avoid turning relevant documents over to parties to this litigation in compliance with lawful discovery demands.

Based on all facts, the Court is forced to conclude, therefore, that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith.

(25) Within the ambit and requirement of its First Set of Interrogatories, filed on December 31, 1975, UNC's Second Set of Interrogatories with even more particularity and specificity ask, in almost every question, for the separate identification of documents relating to the subject matter of each separate interrogatory, and production of all documents so identified. In GAC's First Answers to such Second Set of Interrogatories, filed on September 26, 1977, no identification of documents was made and virtually no documents were produced, despite UNC's clear request for such identification and production.

(26) In its October 11, 1977, Order, the Court required and ordered GAC to "separately, clearly and definitively identify all documents, where such identification is requested, whether such documents be housed only in Canada, only in the United States, in both countries or elsewhere."

(27) Rather than identifying the documents, GAC instead wrote a Canadian Minister asking if it could get permission to reveal "a summary of contents" of the documents. As this Court held on November 18, 1977, the Court's October 11, 1977, Order did not specify that a "summary of contents" be stated as part of the identification of documents. The Court's Order of October 11, 1977, to identify documents was not performed or complied with, but, rather, it was sought to be avoided, and willfully and deliberately violated by GAC.

(28) GAC next wrote a letter to a Canadian Minister who has been determined by the courts of Canada to have no authority to interpret or deal with the Uranium Security Regulations. Nevertheless, in full knowledge that the Minister to whom it wrote had no legal authority to interpret the Regulations, GAC asked and waited for his interpretation as to whether he thought it could identify documents in accordance with the Court's October 11 and November 18, 1977, Orders. A letter was received from the Canadian Minister saying he had no authority to interpret the Regulations, but that in his personal opinion, the Regulations did not allow identification.

(29) The Canadian Security Regulations on their face prohibit only revealing "contents or information contained in" cartel documents in Canada. A reasonable interpretation of that language, and this Court so reads it, would mean that simple identification, giving the date of the document, the author, addresses, and general subject matter, would not violate the law of Canada because the "contents or information" contained in the document itself would not be revealed.

(30) Nevertheless, GAC has refused to comply with the Order of this Court also concerning identification of the Canadian documents. As of this date, GAC has not identified the documents in Canada for the benefit of the Court and the parties nor has it even stated or disclosed the number of documents housed in Canada, thereby following its established practice of concealing, rather than revealing, pertinent information.

(31) The Court's October 11, 1977, Order also required GAC to "take affirmative action and to exert all lawful effort reasonable and possible to bring about the production" of documents housed in Canada. In order to be held to have been acting in good faith, the Court said that GAC should "seek diligently dispensation from those Canadian laws so that it could lawfully produce documents to which such laws may pertain."

(32) GAC's response to this requirement that it take "all lawful effort reasonable and possible" (other than so late as February 22, 1978, to offer to take other counsel and the Court to Canada to talk to Canadian officials about production of documents, in person), was to write a simple letter to the Canadian Minister of Energy, Mines and Resources, asking if he would consent to release the documents in question. The Canadian government's answer was "no."

(33) Actions taken by parties in similar cases in dealing with foreign governments which have imposed secrecy laws are instructive as to the standard of "good faith" to be used in dealing with foreign governments to secure the release of documents. In *In Re Ampicillin Litigation*, in which Judge Sirica ordered that findings of fact be made against a party which refused to produce documents and because of a British secrecy law, the Defendant undertook diligent and long-term negotiations with the British government which ultimately resulted in the documents being released in their entirety.

(34) Similarly, in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), "good faith" in dealing with a foreign government over the release of documents was found only after the petitioner had negotiated for two years with the Swiss government, which resulted in the release of over 190,000 documents. In addition, petitioner there persuaded the Swiss government to allow a neutral third party agreed upon by petitioner and the Swiss government to inspect the documents and obtain the release of some of them.

(35) GAC's writing a simple letter to a Canadian Minister who has been declared by law to have no authority to interpret Canadian Security Regulations or to grant a dispensation therefrom does not constitute a "good faith" effort to secure the release of documents in Canada or the information contained in them. Neither GAC, nor Gulf Minerals Canada, Ltd., nor Gulf Oil Corporation has entered into any negotiations with the Canadian government, or taken any further action beyond writing a simple letter insofar as made known to this Court. Such action does not constitute the "good faith" and "diligent" effort to secure the release of the documents required by the Court's October 11, 1977, Order. In fact, GAC's actions demonstrate its actual intent to conceal the documentary evidence concerning the cartel rather than to produce it in good faith to the parties to this litigation and the Court.

(36) UNC filed a Motion on November 4, 1977, asking that this Court find all facts provable from the documents stored in Canada against GAC. The Court authorized the presentation of evidence at an evidentiary hearing.

(37) At the aforesaid evidentiary hearing, GAC put on evidence through an attorney with Howrey and Simon, who testified about the efforts made by that law firm to identify

documents in answer to UNC's Interrogatories. GAC put on absolutely no evidence about how the documents came to be stored in Canada, or why they were there.

(38) UNC moved the admission at the evidentiary hearing of four separate statements by Mr. L. T. Gregg in his *Westinghouse (Richmond)* deposition. The admissibility of this deposition testimony was stipulated to by counsel for GAC on the record.

(39) Mr. Gregg's deposition testimony established that Gulf followed a deliberate policy of housing the cartel documents in Canada, rather than in the United States. His testimony also established that to the extent documents were in the United States, it was understood that they were to be stored in the offices of the Pittsburg law department, where they could be shielded by a claim of attorney-client privilege.

(40) It was on this uncontradicted factual record that the Court made its findings on November 18, 1977, that Gulf followed a conscious and deliberate policy of housing the cartel documents in Canada. That finding is reiterated here. Gulf's action in regard to storing cartel documents in Canada amounts to deliberately courting or seeking legal impediments to the production of the records.

(41) UNC has complied with GAC's discovery requests fully and in good faith insofar as anything in that regard has been brought to the attention of or is known to the Court. No representation to the contrary has been made by any party hereto.

(42) All other parties to this litigation except GAC have also made good faith efforts at discovery, and have both produced documents and answered interrogatories in good faith.

(43) Based on the deposition testimony given by L. T. Gregg in this case, it is apparent that there are documents which presently exist in the files of Gulf Minerals Canada, Ltd. (a wholly owned subsidiary of Gulf) which are highly relevant to the antitrust, fraud and breach of fiduciary duty allegations by UNC in its Complaint and in its defense to GAC's Counterclaim. GAC has produced to the parties to this litigation only a small part of those documents. GAC's refusal to produce documents housed in Canada since December 31, 1975, was not based on inability to comply with production requests, but rather on bad faith refusal to produce.

(44) The cartel documents and records were clearly within the ambit and requirement of a good faith compliance with the initial discovery demands made herein by UNC in its First Set of Interrogatories on December 31, 1975, and numerous subsequent demands made prior to September 23, 1976, the effective date of the Canadian Uranium Information Security Regulations.

(45) Defendant, GAC, was in default and violation of its obligation to produce cartel documents from Canada and elsewhere in this case, prior to and long before September 23, 1976, wherein and whereby a good faith compliance with lawful discovery demands, their agreements and the Orders of this Court, would have produced in this case all of such cartel documents before there was a Canadian law or prohibition against so doing.

(46) The findings and recitals in the Court's Order of November 18, 1977, relating to discovery are adopted and incorporated herein by reference as a part of the "Recitals" of this Order. A copy of said Order of November 18, 1977, is hereunto attached.

(47) In this situation, GAC's failure to produce in good faith and failure to answer interrogatories in good faith has deprived UNC of a full and fair opportunity to cross-examine GAC's witnesses to defend against GAC's counterclaims for specific performance and damages; to rebut GAC's defenses to their claims; or on its case in chief to properly present United Nuclear's antitrust claims pleaded in the Complaint. Similarily, GAC's failure in discovery has deprived this Court of evidence which is indispensable to a proper and just adjudication of the issues in this case.

(48) The Court concludes that the only just and proper way to protect and secure due process rights to a fair trial for UNC, and the defendant, I & M is to impose sanctions under Rule 37 of the New Mexico Rules of Civil Procedure.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

A. The Court hereby adopts and imposes the following Rule 37 sanctions against the defendant, GAC, and in favor of the other parties to this case, adopted and found as fact because of the failure of defendant, GAC to comply with discovery Rules and the Orders of this Court, which failure the Court finds to be willful and deliberate, to-wit:

1. Gulf Oil Corporation (Gulf), Gulf General Atomic (GGA), Gulf Minerals Canada, Ltd. (GMCL), General Atomic Company (GAC), and Gulf Minerals Resources Company (GMRC), severally and as co-conspirators with each other, and with other members and participants therein, participated in the formation and operation of an international conspiracy and cartel of uranium producers ("the cartel"), from at least 1972 to 1975. The purpose and effect of the cartel was to limit the supply, control production, allocate markets and fix the price of uranium.

2. The Canadian Government encouraged, but in no way required or mandated the membership of GMCL in the cartel. Neither Gulf, GGA, GMCL, GAC, nor GMRC, nor any of them, was ever compelled by the Canadian Government to participate in the cartel. GMCL would not have had the authority to join and participate in the cartel without authorization from responsible officers of Gulf, who were members of the so called "Executive", and who gave such authorization and sanction to the participation, actions and dealings of GMCL in the cartel.

3. GMCL is and was a wholly owned subsidiary of Gulf, and after GMCL joined the cartel, its members and members of the cartel Operating Committee had a number of meetings at various locales around the globe. At such meetings, the members of the cartel, including GMCL, agreed: (a) not to sell to middlemen, wherever located, or, alternatively, to do so only on highly discriminatory terms. Such middlemen included and were understood by both GMCL and Gulf to include both Westinghouse and Gulf United Nuclear Fuels Corporation (GUNF), and (b) to divide world markets (including the USA) and to fix the price of uranium. GUNF at all times was a corporation wholly owned by Gulf and UNC as a joint venture between them, and with Gulf holding majority ownership and management control thereof.

UNC and Gulf were under a fiduciary relationship, one to the other in their aforesaid joint venture creation, ownership and operation of GUNF. As fiduciaries, such owed to the other full disclosure of any information affecting or that might affect the operation and success of GUNF.

4. Said cartel agreements were carried out effectively; the world market price of uranium was fixed at artificially high levels by the cartel, and GUNF, a middleman, was greatly handicapped and damaged in its efforts to procure uranium.

5. Pursuant to an agreement with the cartel, Gulf, individually and with and through its divisions, affiliates and subsidiaries, including but not limited to GMCL, restricted and withheld production of uranium at Mount Taylor in New Mexico in order to limit the supply and control production of uranium in New Mexico, with the independent specific intent to monopolize New Mexico uranium reserves. The restriction of Mount Taylor production was and is a part and parcel of the aforesaid conspiracy by Gulf and by the cartel. Such restriction of production was a combination and attempt to monopolize as well as actual monopolization of New Mexico uranium reserves, and has constituted and constitutes a substantial adverse effect on New Mexico commerce.

6. Gulf and GAC executed the 1973 Uranium Supply Agreement and the 1974 Uranium Concentrates Agreement with United Nuclear Corporation (UNC) with the intent and as a part of an attempt, combination and conspiracy, engaged in by Gulf, GAC, their affiliates, divisions and subsidiaries, to monopolize New Mexico uranium reserves, and with the purpose and effect, in furtherance of the cartel conspiracy, to limit supply and control production and competition with the cartel from a New Mexico uranium producer. Both of the aforesaid contracts had and have as their object by Gulf and GAC, and do in fact operate, to restrict trade or commerce of a product of the mines of New Mexico, and have constituted and constitute a substantial adverse effect on New Mexico commerce.

7. Gulf and GAC executed the aforesaid agreements as a part of the attempt, combination and conspiracy engaged in by them, their affiliates and subsidiaries and the cartel to monopolize and the actual monopolization of New Mexico uranium reserves.

8. Gulf and GAC knew and intended that the cartel and its actions would and did in fact substantially raise the price of uranium in the United States of America domestic market, which did substantially and adversely affect New Mexico commerce.

9. Pursuant to a policy of secrecy and the cartel's directions, rules or requirements concerning secrecy, neither did Gulf, nor GAC, nor anyone acting for them, ever inform UNC or GUNF about their aforesaid participation in or the actions of the cartel, at anytime before the execution of or negotiations concerning the aforesaid 1973 and 1974 agreements. Gulf and GAC thereby breached any fiduciary duty it may have owed in the premises to UNC or to GUNF, or to both.

10. Pursuant to the cartel's express inclusion of the United States market and United States buyers in its price fixing scheme, Gulf, GMCL and GGA quoted uranium to United States utilities at cartel prices, and to GUNF at prices above cartel prices, with specific and predatory intent of injuring GUNF and UNC, thereby breaching any fiduciary duty in the premises owed to UNC and committing a predatory act against GUNF.

11. Motivated by inside knowledge of the cartel's existence, policies and actions and its plan to keep UNC's uranium locked up and out of competition with the cartel, Gulf refused to supply uranium to GUNF as it had led

UNC and GUNF to believe it would do and refused to allow GUNF to purchase uranium on the open market, thereby breaching any fiduciary duty it may have owed to UNC.

12. The cartel viewed middlemen as serious competitors, and discriminated in price against them in order to eliminate them as competitors. Gulf Oil Corporation and General Atomic Company executed the 1973 and 1974 Uranium Supply Agreements with the purpose and effect of eliminating middlemen as competitors by keeping material off the market which they might purchase.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

A. Judgment by default, except upon the issues of damages, be and it hereby is entered and granted:

1. Unto United Nuclear Corporation upon its Complaint against General Atomic Company, and

2. Unto Indiana & Michigan Electric Company upon its Crossclaim against General Atomic Company.

B. The defenses of General Atomic Company to the Complaint of United Nuclear Corporation and to the Crossclaim of Indiana & Michigan Electric Company and its Counterclaim against United Nuclear Corporation and its Crossclaim against Indiana & Michigan Electric Company, be and they all hereby are stricken.

IT IS FURTHER ORDERED that the trial of this case on its merits continue and proceed upon determination of damages only, and such other matters as may now be appropriate in view of the granting of default judgments herein.

IT IS FURTHER ORDERED that the Court shall and hereby does reserve the prerogative to make and enter herein such other, further, additional or different findings, orders or judgments, and to do such acts and conduct such proceedings as may be necessary to give full effect to the foregoing Sanctions Order and Default Judgments and to enforce justice between the parties hereto.

/s/ EDWIN L. FELTER
District Judge

APPENDIX B

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY,
a partnership composed of
Gulf Oil Corporation and
Scallop Nuclear Inc.,
Defendant.

ANSWER TO FIRST AMENDED COMPLAINT AND DEFENDANT'S COUNTERCLAIM

General Atomic Company, without waiving its objections to the Court's jurisdiction over its person, for its Answer as to all matters in which arbitration is not being sought by Defendant and as to all issues which the Court may deem unarbitrable, states and alleges as a[n]:

* * * * * *

EIGHTH DEFENSE

Some of the issues in this case are subject to arbitration pursuant to Article XVII of the Uranium Supply Agreement of 1973 (Exhibit 5 to the Complaint). In addition, United is bound by the arbitration provisions of the Duke contract and the two Commonwealth Edison contracts. Commonwealth Edison has demanded arbitration of certain issues pursuant to the

arbitration provision of the La Salle Contract. Commonwealth Edison may demand arbitration pursuant to the provisions of the Dresden Contract. Duke has demanded arbitration of certain issues pursuant to the arbitration provision of the Duke Contract. United's obligations to General Atomic may be affected by the resolution of the issues with respect to which Duke and Commonwealth Edison have demanded and may demand arbitration. General Atomic is currently opposing arbitration with both Commonwealth Edison and Duke. United is a party to Commonwealth Edison's arbitration demand and is also opposing that arbitration. General Atomic demands arbitration of only those issues which General Atomic is ultimately required to arbitrate with Duke and Commonwealth Edison pursuant to the above contracts, and which also can be arbitrated jointly among United, General Atomic and the respective utility.

Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement.

To the extent possible, General Atomic Company intends to conduct the arbitration of the issues demanded above jointly with the arbitration of the same issues between the respective power companies and itself.

* * * * * *

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